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Berkshires Investments, LLC v. Taylor Respondent's Brief 2 Dckt. 38599

IN THE SUPREME COURT OF THE STATE OF IDAHO

BERKSHIRE INVESTMENTS, LLC, an Idaho limited liability, and THOMAS G. MAILE, IV, and COLLEEN BIRCH-MAILE, husband and wife,

Plaintiffs/Counterdefendants/
Appellants,

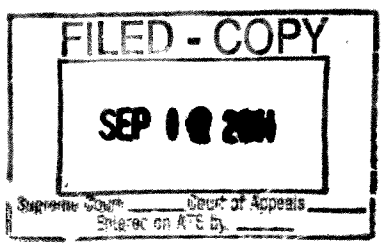
vs.

CONNIE WRIGHT TAYLOR, fka CONNIE TAYLOR, an individual; DALLAN TAYLOR, an individual; R. JOHN TAYLOR, an individual; CLARK and FEENEY, a partnership; PAUL T. CLARK, an individual; THEODORE L. JOHNSON REVOCABLE TRUST, an Idaho revocable trust; JOHN DOES I-JOHN DOES X; AND ALL PERSONS IN POSSESSION OR CLAIMING ANY RIGHT TO POSSESSION,

Defendants/Counterclaimants/
Respondents.

Supreme Court No. 38599

District Case No. CV OC 07-23232



TAYLORS/JOHNSON TRUST RESPONDENTS' BRIEF

Appeal from the District Court of the Fourth Judicial District, in and for the County of Ada

The Honorable Richard D. Greenwood, District Judge presiding

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I. STATEMENT OF THE CASE

A. Nature of the case

Thomas and Colleen Maile, along with their solely-owned company, Berkshire Investments ("Mailes"), filed this lawsuit seeking to set aside a 2006 judgment entered in *Taylor v. Maile*,[1] an Ada County case presided over by The Honorable Ronald Wilper.[2] That judgment returned to the Johnson Trust 40 acres of real property ("the Johnson farm") which the Mailes bought in 2002. The judgment was affirmed by the Supreme Court on January 30, 2009.

In this action, Mr. and Mrs. Maile allege Dallan and John Taylor lied when they said they were remainder beneficiaries of the Johnson Trust, and that those allegedly false statements defrauded Judge Wilper into entering the judgment. Mailes ask the court to return the Johnson farm to them, based on allegations of fraud on the court, abuse of process, interference with contract / economic advantage, nine acts of grand theft and obtaining property by false pretenses, equitable, judicial, and quasi-estoppel, racketeering, subornation of perjury, and three claims of legal malpractice.

All of the Mailes' claims were dismissed on summary judgment. The Johnson Trust's counterclaims for abuse of process and interference with a prospective economic advantage proceeded to trial. The jury found against the Mailes on both counts.

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[1] Taylor v. Maile and Theodore Johnson Revocable Trust v. Maile were consolidated and will be referred to jointly as "Taylor v. Maile" for ease of reference.

[2] Because this case involves four lawsuits in front of three different judges, we refer to the Judges by name for the sake of clarity, rather than using the terms "trial court" or "district court."

B. Statement of Additional Relevant Facts

The Johnson Trust Respondents concur in the Statement of the Case in the Clark and Feeney Respondents' Reply brief, and submit the following additional relevant facts.

In Taylor v. Maile,[3] the Mailes filed 21 counterclaims and affirmative defenses. On February 13, 2006, Judge Wilper entered an order dismissing 12 of the claims: tortious interference with the purchase contract, tortious interference with prospective economic advantage, slander of title, wrongful cloud of title, civil conspiracy, breach of contract, good faith and fair dealing, indemnification agreement, breach of peace and quiet enjoyment, breach of warranty deed, failure to join indispensable parties, and accord and satisfaction.[4] That order repeatedly stated that there was not even a scintilla of evidence to support the Mailes' claims.

The Supreme Court's *Taylor v. Maile I* decision held that the Taylors had standing to pursue their claim against Mailes, and reversed the dismissal of the beneficiaries' action. On remand, Judge Wilper granted summary judgment to the Taylors. The ruling was based on the fact that the successor trustees (Rogers) had a conflict of interest which, under Idaho Code § 68-108(b), mandated court approval of the sale. There is no dispute of the fact that court approval was not obtained; Judge Wilper ruled the lack of court approval made the sale to Mailes void ab initio. Judge Wilper also ruled that the Mailes were not bona fide purchasers because they "had actual knowledge that the Rogers were exceeding or improperly exercising their powers as a matter of law." This finding was based on the undisputed fact that Thomas G. Maile prepared the

[3] References to the appeal in Taylor v. Maile are in italics; references to the underlying proceeding are not.

[4] R. p. 1755-1764.

trust agreement creating the conflict of interest. R. p. 209-216. Mr. Maile also drafted all of the real estate closing documents,[5] and did not advise Beth Rogers of the need for court approval.[6] The Mailes pointed out the conflicting interests of the beneficiaries on page 7 of the Respondent's brief in *Taylor v. Maile I.* Mr. Maile signed the brief (*Taylor v. Maile I*, Respondent's brief, page 12), but now claims the statement about the conflict of interest was a mistake made by the attorneys who drafted the brief.[7]

After granting summary judgment to the beneficiaries, Judge Wilper on June 7, 2006 entered a judgment which quieted title in the farm to the Johnson Trust. R. p. 313-316. That judgment dismissed all of the Mailes' remaining claims (unjust enrichment, unclean hands, failure to mitigate, laches, equitable estoppel, quasi estoppel, and tortious interference with contract between Mailes and their lender). The judgment was amended on July 21, 2006[8] to clarify that Mailes would be entitled to the return of the $400,000 purchase money and would be allowed to pursue their unjust enrichment claim. R. p. 310-312.

At the bench trial on their claim for unjust enrichment, Mailes sought $775,000 in addition to the return of the $400,000 purchase money.[9] Judge Wilper issued a Memorandum Decision on November 29, 2006 which denied Mailes' claim for unjust enrichment, ruling Mr.

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[55] Tr. Vol. II, p. 80, L. 23 – 81, L. 1

[6] Tr. Vol. II p. 80, L. 7-8; Tr. Vol. II, p. 82, L. 7-10.

[7] Tr. Vol. II, p. 83, L. 20 – p. 84, L. 9.

[8] These judgments and subsequent amendments will be referred to collectively as "the judgment."

[9] Tr. Vol. I, p. 66, L. 2

Maile had engaged in sharp practices and self dealing in the purchase. R. p. 221, L. 9-15. Mr. Maile testified at trial that he had advised Mr. Johnson to seek independent advice about selling him the land for $400,000. Judge Wilper's decision stated "The Court is not persuaded that Mr. Maile so advised Mr. Johnson." R. p. 221, L. 2-8.

The Mailes appealed those judgments. Their Notice of Appeal[10] listed 16 issues, including the following:

> (f) Was the Court correct in determining that the Respondents as beneficiaries of the trust had standing to pursue the claims which were ultimately granted by the Beneficiaries' Motion for Summary Judgment?
>
> (k) Did the Court err in failing to consider the effect of the Disclaimer and Indemnification Agreement executed by the Respondents and the successor trustees and the other beneficiaries of the trust relating [to] the claims against the Appellants?
>
> (n) Did the Court err in not allowing the counterclaims of the Appellants to proceed to trial?

The Mailes' briefs in *Taylor II* argued each of these issues. The Mailes' reply brief asked that the judgment be set aside because they say the Taylors disclaimed all of their rights as beneficiaries, then misrepresented their status and obtained the judgment by fraud. Mailes based their claims on the November 15, 2004 Petition for Appointment of Trustees filed in Judge Beiter's court. R. Exh. 12 at 38-39. That petition mistakenly stated that Helen Taylor was the sole beneficiary, rather than that she was the sole *direct* beneficiary.[11] The error was corrected

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[10] R. p. 1006-7.

[11] Tr. Vol. I, p. 50, ll. 11-20.

when Taylors amended the petition on April 18, 2005 to clarify the fact that Helen Taylors' sons are remainder beneficiaries of the Johnson Trust.[12]

The Mailes did not attach the amended petition to their briefing to the Supreme Court in *Taylor v. Maile II*, nor did they disclose the pivotal fact that the Taylors had corrected the error in the initial petition. When the Taylors filed a motion to augment and complete the record with the amended petition, the Mailes objected.[13]

While their appeal in *Taylor v. Maile II* was pending, on December 31, 2007, the Mailes filed the present action. In this suit, they are again arguing the Taylors disclaimed their rights as beneficiaries, lacked standing, and misrepresented their status. Again, Mailes ask that the judgment be set aside and the Johnson farm be returned to them. They say the claimed inconsistency in the documents "didn't dawn on them" until the summer of 2007.[14] Mr. Maile attributes this delay to the way the documents were "tucked away" in his files.[15]

Just as in the *Taylor v. Maile II* appeal, in the present action the Mailes do not address the first paragraph of the Disclaimer Agreement, in which the Taylor beneficiaries reserved the right to pursue the suit over the Johnson Trust property. The Mailes again support their interpretation that the Disclaimer Agreement divested Taylors of their status as beneficiaries by

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[12] Tr. Vol. I, p. 51, L. 19 – p. 52, L. 6.

[13] R. p. 845-848,;Tr. Vol. I, p. 98, ll. 2-17, p. 340, L. 23 – p. 342, L. 16.

[14] Tr. Vol. II, p. 57, L. 18 – p. 58, L. 16.

[15] Tr. Vol. II, p. 36, L. 12 – p. 37, L. 16.

pointing to the initial November 15, 2004 Petition for Appointment of Trustees in probate court.[16] Just as in the prior appeal, they do not acknowledge that the petition was amended.

On January 30, 2009, this Court released its opinion in *Taylor v. Maile*, 146 Idaho 705, 201 P.3d 1282 (2009) ("*Taylor v. Maile II*"), which rejected Mailes' interpretation of the Disclaimer Agreement. The Court held the Taylors retained their rights to the lawsuit to recover the Johnson farm, and affirmed the lower court's ruling returning the farm to the Johnson Trust.

The Mailes had recorded a lis pendens in the first suit on May 18, 2006, but did not release it when this decision was issued. They left the lis pendens of record until August 3, 2009, the same date they filed a Notice of Vendee's Lien.[17]

On February 17, 2009, while their claims to set aside Judge Wilper's judgment were pending in Judge Greenwood's court, Mr. Maile filed a Motion for Entry of Order Compelling Payment of Sums Due and Owing and Interest in Taylor v. Maile.[18] In that motion, they asked Judge Wilper to enforce the judgment which their second lawsuit claims should be set aside. Judge Wilper denied the motion, ruling that the Trust is not required to return the purchase money to the Mailes as long as they are seeking title to the property.[19]

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[16] R. p. 47-49.

[17] Tr. Vol. II, p. 70, L. 16 – p. 71, L. 12.

[18] R. p. 1282.

[19] Tr. Vol. I, p. 74, LL. 12-20.

Judge Greenwood entered his order dismissing the Mailes' complaint in the second lawsuit on July 2, 2009.[20] On August 3, 2009, the Mailes filed three documents: (1) motion for an interlocutory appeal in Berkshire v. Taylor);[21] (2) release of the lis pendens in Taylor v. Maile;[22] and (3) a Notice of Vendee's Lien in Taylor v. Maile.[23]

On November 3, 2009, while their request for permissive appeal of the order dismissing their claims was awaiting a decision, Mailes filed a Motion in Taylor v. Maile asking Judge Wilper to foreclose the vendee's lien.[24] Their motion sought an order returning title to the Johnson farm to Mailes' LLC.[25] On March 15, 2010, Judge Wilper entered an Order Denying the Motion for Foreclosure of Vendee's Lien, stating:

> "The Court finds that it is Defendants' [Mailes'] actions which prevent Plaintiffs [Johnson Trust and Taylors] from satisfying the judgment at this time. Defendants' attempt to enforce this Court's judgment, while simultaneously attempting in a collateral proceeding to challenge that judgment, is disingenuous."[26]

II. ADDITIONAL ISSUES ON APPEAL

Are The Johnson Trust and its trustees entitled to costs and fees on appeal?

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[20] R. p. 1362 – 1378.

[21] R. p. 1422-23.

[22] R. p. 1427.

[23] R. p. 1428.

[24] R. p. 1445 – 1452.

[25] R. p. 1449-50.

[26] R. p. 1616-17.

III. ARGUMENT

This is the third appeal which arises from a 2002 real estate transaction between Thomas and Colleen Maile and the Theodore Johnson Trust. Thomas Maile's conduct during that single transaction had two consequences important to this appeal:

1. The contract of sale was declared void ab initio by the court because Thomas Maile failed to follow the law. Mr. Maile's own legal expert testified to this at trial.

2. Thomas Maile was suspended from the practice of law for a period of six months because he failed to follow the Rules of Professional Conduct in his dealings with his client.[27]

The Mailes retaliated by suing the people who told the truth about them, maliciously accusing the Taylors and their attorneys of shameful and illegal conduct. Their claims were dismissed by the district court. A jury found that their conduct was an abuse of process and interference with economic advantage and assessed damages against them.

Despite these repeated acts of misfeasance, malfeasance, and tortious conduct against Ted Johnson and his successors, Thomas and Colleen Maile are back before this court for the third time claiming that they should have Ted Johnson's property.

In the present action, the Mailes seek to relitigate two issues: (1) whether the Mailes have the right to own the Johnson farm, and (2) whether Helen Taylor's sons have standing to challenge that purchase. These issues have been decided in two prior appeals involving these same parties, *Taylor v. Maile I,* 142 Idaho 253, 127 P.3d 156 (2005), and *Taylor v. Maile II,* 146 Idaho 705, 201 P.3d 1282 (2009).

[27] The Johnson Trust requests that this Court take judicial notice of its order dated August 3, 2011.

In the second lawsuit, which they insist on calling "the perjury complaint," the Mailes sought a new judge whom they hoped would set aside Judge Wilper's judgment and enforce the contract that was void ab initio due to Mr. Maile's failure to follow the law. In the present appeal, in essence, Mailes ask this Court to reverse its own decision in *Taylor v. Maile II.*

Mailes blame their loss of the property on the Taylor beneficiaries, but the Mailes' expert witness (John Runft) testified that nothing the Taylors did or said could change the fact that the contract was void.[28] Mailes' accusations against the Taylors and their attorneys have no basis in fact or law. However, even if those allegations were true, it would not change the fact that the Mailes never had a legitimate legal right to the Johnson farm because they failed to follow the law and obtain court approval.

A. The Taylors' status as beneficiaries and the fact that Mailes have no legitimate claim to the Johnson farm are the Law of the Case

Under the law of the case doctrine, when "the Supreme Court, in deciding a case presented states in its opinion a principle or rule of law necessary to the decision, such pronouncement becomes the law of the case, and must be adhered to throughout its subsequent progress, both in the district court and upon subsequent appeal." *Swanson v. Swanson*, 134 Idaho 512, 515, 5 P.3d 973, 976 (2000).

The Idaho Supreme Court has ruled, twice, that the Taylor beneficiaries have standing to challenge Mailes' purchase of this property. In *Taylor v. Maile II*, the Supreme Court rejected

[28] Tr. Vol. I, p. 300, L. 24 – p. 301, L. 22.

Mailes' interpretation of the Disclaimer Agreement, and affirmed the ruling that the Mailes' contract to buy Ted Johnson's farm was void ab initio.

The Mailes may argue that the law of the case doctrine does not apply to this action, but the fact that this second lawsuit is in reality just a continuation of Taylor v. Maile is demonstrated graphically by the Mailes' opening appellate brief. Their Statement of Facts is five pages long, yet only three sentences relate to the current lawsuit. Mr. and Mrs. Maile can't avoid the prior rulings by filing a new lawsuit that is based on the same facts and arguments raised in *Taylor v. Maile*. The law of the case doctrine precludes Mailes' attempts to revisit these issues.

B. The trial court properly held the Mailes' claims were barred by both issue preclusion and claim preclusion.

These Respondents concur in the Clark and Feeney Respondents' briefing on Judge Greenwood's ruling that all of the Mailes' claims in the current action are barred by *res judicata.* All of the Mailes' claims either were, or could have been, litigated in Taylor v. Maile.

Judge Greenwood correctly noted that five of the claims in Mailes' complaint in this case (quiet title, tortious interference with a contract, tortious interference with a prospective business advantage, equitable estoppel, and quasi estoppel) were raised by the Mailes, and rejected, in Taylor v. Maile. R. p. 1370. He was also correct in ruling that the remaining claims (abuse of process, negligence, gross negligence, and racketeering) were based on the same transactions and operative facts, and are therefore barred under both issue preclusion and claim preclusion.

Mailes claim they have not had their day in court on their equitable claims, and "never had a trial before Judge Wilper." That is not true; they had a trial on their equitable claim for

unjust enrichment. The judgment returning the property to the Trust provided for repayment of the $400,000 purchase price; when Mailes sought an additional $775,000 for claimed improvements on the farm, Judge Wilper ruled they were not entitled to a single penny. The Mailes had their day in court and lost, and cannot take another bite of the apple by filing a new lawsuit based on the same facts and arguments as the Taylor v. Maile case.

There is no merit to Mailes' argument that they were wrongfully deprived of their day in court on their estoppel claims. The doctrines of waiver and estoppel cannot be used to give effect to a contract which is void because it violates a statute. *KTVB v. Boise City*, 94 Idaho 279, 486 P.2d 992 (1971), citing *Godoy v. County of Hawaii*, 44 Hawaii 312, 354 P.2d 78, 84 (1960) and *Lloyd Crystal Post No. 20 v. Jefferson County*, 72 Idaho 158, 237 P.2d 348 (1951). Their continued focus on the question of whether the Johnson Trust was entitled to rescind the contract is also misplaced, as there is no need to rescind a contract which is void. They argued that position at length in their briefing in *Taylor v. Maile II*. R. p. 938-940.

The Mailes are simply unhappy with the result of the five years of litigation in Taylor v. Maile, and brought this second action so they could try a different approach in front of a different judge. They acknowledge that they knew all the relevant facts they claim support this new action while Taylor v. Maile was pending. They could and should have litigated those issues before Judge Wilper, rather than asking another judge to overturn Judge Wilper's judgment and the Supreme Court decision affirming his rulings. At the same time they were asking Judge

Greenwood to set aside Judge Wilper's judgment, Mailes twice went into Judge Wilper's court asking for orders to enforce that very judgment.

The Mailes' forum shopping is a perfect example of why the doctrine of *res judicata* is such a fundamental principle in our legal system. Judge Greenwood was correct to rule that their suit was barred by both claim and issue preclusion.

C. The Jury Verdict was supported by the evidence, and the Trial Court did not Err in Denying Mailes' Motion for Judgment Notwithstanding the Verdict

Judge Greenwood did not err in denying the Mailes' motion for judgment notwithstanding the verdict. On the motion for a judgment notwithstanding the verdict, the Mailes are held to admit the truth of all adverse evidence and every inference that may legitimately be drawn from the evidence.[29] There was substantial evidence in the record upon which the jury properly rendered its verdict for the Johnson Trust.

1. There was substantial evidence to support the jury's verdict that Mailes committed abuse of process

The elements of abuse of process are (1) a willful act in the use of legal process not proper in the regular course of the proceeding, and (2) the act was committed for an ulterior, improper purpose.[30]

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[29] *Schwan's Sales Enters., Inc. v. Idaho Transp. Dep't*, 142 Idaho 826, 830, 136 P.3d 297, 301 (2006).

[30] *Badell v. Beeks*, 115 Idaho 101, 104, 765 P.2d 126, 129 (1998).

(a) Acts not proper in the regular course of the proceeding

Judge Greenwood did not err in ruling there was substantial evidence that the Mailes' conduct amounted to acts not proper in the regular course of the proceeding.

Mailes argue all they did was file a "mere complaint" and two lis pendens. They claim those actions could not support a finding that their conduct was wrongful, which is an element of abuse of process and interference with prospective economic advantage. The facts, however, show that they engaged in a great deal of conduct beyond merely filing a complaint. Mr. and Mrs. Maile filed a totally frivolous lawsuit which was barred by *res judicata.* Rather than allowing their appeal of Judge Wilper's rulings to decide the issue, as the law requires, they instead initiated an entirely new action, in a new court, seeking a different ruling on their arguments as to why they should have been allowed to keep the property.

Mailes' lawsuit is based on their strained misinterpretation of the Disclaimer Agreement. Just as in the prior action, they refuse to discuss the first paragraph of that agreement. Their brief on appeal shows that they are still clinging to their misinterpretation even after the decision in *Taylor v. Maile II* told them it is incorrect. Mr. and Mrs. Mailes' theory continues to be that when Taylors signed the Disclaimer Agreement, they gave up their beneficial rights to the suit against the Mailes. This leads them to the conclusion that every one of the many references in documents and briefs to the Taylors being beneficiaries of the Johnson trust was a lie, a criminal act, part of a conspiracy to steal their land away.

This theory did not prevail in the previous action, and using it as the basis of a new lawsuit was frivolous and totally unreasonable. As Judge Greenwood noted in his ruling on the motion for judgment notwithstanding the verdict and the motions for costs and fees:

> There is evidence from which a jury could find, clearly in my opinion, that there was abuse of process, and it goes beyond the mere filing of the complaint, although I believe that in this instance the filing of the complaint itself under the facts of this case would be sufficient to support a claim for abuse of process. ... This is a lawsuit that should never have been filed. And beyond that, the allegations in there, the personal attacks upon the attorneys in my view were unjustified. There's certainly no evidence that supported that. Accusing them of racketeering and criminal conduct, regardless of heartfelt feelings of the Mailes, was uncalled for in this case. I think a jury could find that and see that.[31]

Mailes' "mere complaint" argument relies on an antiquated and narrow view of "process" discussed in *Badell v. Beeks*. That case is now 23 years old, and the trend in more recent cases is to recognize that an abuse of process claim can be based on the entire range of procedures incident to the litigation process. *General Refractories Co. v. Fireman's Fund Ins. Co.,* 337 F.3d 297 (3rd Cir. 2003). Abuse of process may be shown by proving that a lawsuit was "devoid of reasonable factual support or arguable legal basis." See *Seipel v. Olympic Coast Inv.*, 188 P.3d 1027, 1034 (Mont. 2008); *Adams v. Whitman*, 822 N.E.2d 727, 730 (Mass.App. 2005); *Yandon v. Lowry*, 126 P.3d 332, 337 (Colo.App. 2005). Although the case was subsequently withdrawn, the opinion issued by the Idaho Supreme court in *Cunningham v. Jensen*[32] indicates Idaho follows the modern trend that broadens the definition of "process" to include a wide range of procedures related to the litigation process. The Court in *Cunningham* cited to *General*

[31] Tr. April 14, 2011 hearing, p. 13, L. 10 – p. 14, L. 6.

[32] ISSCR 31332, September 14, 2005

Refractories, which held that using a legal process primarily to harass and cause direct injury to an adversary may constitute a perversion of that process. *Supra* at p. 307.

The point of liability is reached when "the utilization of the procedure for the purpose for which it was designed becomes so lacking in justification as to lose its legitimate function as a reasonably justifiable litigation procedure." *Nienstedt v. Wetzel*, 651 P.2d 876, 882 (Ariz. Ct. App. 1982). That is precisely what happened in the Mailes' second lawsuit.

(1) The Mailes' lawsuit had no legitimate factual or legal basis

There was substantial evidence for the jury to find that the Mailes' second lawsuit was an abuse of process because it had no legitimate basis in either the facts or the law.

Although they had raised their standing arguments before both the trial court and the appellate court in Taylor v. Maile, the Mailes used the same facts as the basis of the second lawsuit. The Supreme Court opinion in *Taylor II* completely rejected the Mailes' standing argument, but even after that decision was announced, the Mailes continued to pursue the second lawsuit. Filing a complaint with no legitimate factual or legal basis is a violation of Idaho R. Civ. P. 11(a)(1), is sanctionable under Idaho Code § 12-123, and can never be a proper use of the legal system or a reasonably justifiable litigation procedure.

Mr. Runft acknowledged that it is never appropriate to sue somebody or pursue a legal theory without a legal and factual basis, and that as officers of the court, lawyers have a higher responsibility than non-lawyers to follow that rule. [33] Professor Lewis and John Runft[34] both

[33] Tr. Vol. I, p. 281, L. 6-14.

testified that one of the primary purposes of the civil justice system is to resolve disputes between people with finality. As Professor Lewis explained, the doctrine of *res judicata* is essential because it allows the litigants to get on with their lives, it preserves limited judicial resources, and it prevents the problems that would occur if a matter is allowed to be retried and the outcome is different in the second case.[35]

Professor Lewis walked the jurors though the reasons why the Mailes' second lawsuit was very obviously barred by *res judicata* because it deals with the same transactions and claims they had raised Taylor v. Maile. The professor said this fundamental principal is taught in the first year of law school:

> This is a matter that I would expect every student, except a failing student in civil procedure, to grasp the basics of, that you have a claim preclusion that's transactionally based. You better put everything, all of your gripes in that lawsuit if you are going to sue on a transaction. And once you try an issue and it's decided against you, you live with it.[36]

Professor Lewis testified that this was an "easy call," and that a reasonable attorney, especially one who was the author of both the first and second lawsuits, "should have expected that preclusion doctrine would bar the second suit."[37] Thomas Maile testified "I actually

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[34] Tr. Vol I, p. 280, L. 9-13.

[35] Tr. Vol. I, p. 129 L. 15 – p. 131, L. 2.

[36] Tr. Vol. I, p. 144, L. 25 – p. 145, L. 7.

[37] Tr. Vol. I, p. 151, L. 16 – P. 152, L. 12.

received the highest grade out of 150 students in the first semester of civil procedure."[38] His claim of elevated knowledge in this area of the law supports a conclusion that Mr. Maile was very well aware of the fact that his second lawsuit was barred by *res judicata* and would be dismissed.

Mr. Maile acknowledged their arguments have been rejected by every court which has heard them: "In principal, we were wrong. The Court didn't accept our argument."[39] There was substantial evidence for the jury to find that it was an abuse of process to base the second lawsuit on the same arguments.

2. The purchase contract was void because Mailes failed to follow the law, not because of any representation by the Taylor beneficiaries

The Mailes never had a legitimate legal right to the Johnson farm because they failed to obtain court approval as required by Idaho Code § 68-108(b). Mr. Maile drafted the trust, he drafted all of the closing documents, and he knew that Ted Johnson died only two days before the closing. He had been the attorney for the Trust, but he never told Beth Rogers that she had a conflict of interest and that the sale required the approval of a court.

Mr. Maile admitted his own briefing had raised the conflict of interest, (as was discussed in the opinion in *Taylor v. Maile I.*[40] Mr. Maile acknowledges that when a contract is

[38] Tr. Vol. I, p. 351, LL 9-11.

[39] Tr. Vol. II, p. 111, L. 23-24

[40] 142 Idaho at 259.

declared void, it means that there was never a contract at any time.[41] As the Mailes' expert Mr. Runft testified, "It's void from the beginning."[42] John Runft also testified that nothing the Taylors said or did could change the fact that the contract was void.[43] This testimony definitively shows that the Mailes had no legitimate legal basis to support their filing of the second lawsuit. Nevertheless, at trial both of the Mailes insisted they have an absolute right to own the land, and only the lies of the Taylors had deprived them of the property.

The Mailes likely lost credibility with the jurors when they refused to acknowledge the fact that they have no right to the land even after the Supreme Court's decision. They argue that even on an illegal contract the court can leave the parties as it finds them, which is just another way of saying their void contract should have been enforced.

Mr. Maile testified that the contract was only found to be void "because the Taylor brothers came in saying they were beneficiaries which prompted the Court to declare it void."[44] This is a misstatement of Idaho law. The contract was illegal because it was founded on a transaction prohibited by statute, and once that fact was known to Judge Wilper, he had the duty to raise the illegality and void the contract, sua sponte. *Trees v. Kersey*, 138 Idaho 3, 6, 56 P.3d 765, 768 (2002).

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[41] Tr. Vol II. P. 94, L. 11-17.

[42] Tr. Vol. I p. 295, L. 5.

[43] Tr. Vol. I, P. 301, L. 11-23.

[44] Tr. Vol. II, p. 114, L. 19-24

Mailes also argue that the second lawsuit could not be an abuse of the legal process because it was filed to protect their legitimate economic interest in the land. The problem with this theory is that the Mailes never had a legitimate ownership interest in the land, making this case distinguishable from the *Carter v. Carter*[45] case on which the Mailes rely. Judge Greenwood also correctly noted that the second lawsuit was not necessary in order for Mailes to protect their right to the return of the purchase money when he stated:

> As to the right to file the lawsuit, all of the protection the Mailes needed for their interest in that ground having to do with their down payment was to be found in Judge Wilper's court. There is simply no need to go back and revisit that."[46]

The Vendee's Lien which the Mailes recorded Taylor v. Maile gave them all the protection necessary; there was no need to file a new action which had no legitimate basis.

3. The pleadings in probate court do not support Mailes' claims of fraud on the court.

In the second lawsuit, and also on appeal, Mailes argue that the Taylors misrepresented their status as beneficiaries in their March 9, 2006 Amended Complaint in Taylor v. Maile. They say the reason Taylors "provided such misrepresentations was to take advantage of the Idaho Supreme Court decision rendered in December 2005, holding beneficiaries had standing to sue." Appellants' Opening Brief, page 9.

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[45] 143 Idaho 373, 146 P.3d 639 (2006).

[46] Tr. April 14, 2011 hearing, p. 17, L. 6-11.

One has only to consult a calendar to realize the fatal flaw in this argument. The Taylors filed their Amended Petition clarifying their continued status as residual beneficiaries on April 18, 2005. This was eight months before the decision in *Taylor v. Maile I* on December 23, 2005, and eleven months before the March 9, 2006 Amended Complaint which the Mailes argue was the fraud on the court. The Amended Petition corrected the earlier typographical error, and obviously was not filed to take advantage of a decision that was not yet issued.

Under the doctrine of *functus officio*, the amended petition superseded the prior one, and all subsequent pleadings must be based upon the contents of the amended petition. *Allied Bail Bonds, Inc. v. County of Kootenai*, --- P.3d ----, 2011 WL 2652475 (Idaho 2011), citing *W.L. Scott, Inc. v. Madras Aerotech, Inc.*, 103 Idaho 736, 739, 653 P.2d 791, 794 (1982). The Mailes' expert, John Runft, agreed at trial that when a pleading is amended, the amendment completely takes the place of the first document.[47]

The Mailes consistently refused to acknowledge, recognize, or discuss the fact that the probate petition upon which all their arguments are based was amended long before the beneficiaries' Amended Complaint which they claim constituted a fraud on the court. This ostrich approach undoubtedly damaged their credibility in the jurors' eyes. Mr. Runft, the person they hired to testify they had a valid basis for filing the second lawsuit, testified the Mailes had not told him the initial petition had been amended.[48] Both Thomas and Colleen

[47] Tr. Vol. I, p. 309, L. 23 – p. 310, L. 2.

[48] Tr. Vol. I, p. 310, L. 3-8.

Maile admitted that their briefing to the Idaho Supreme Court did not disclose the amendment and that they objected to the record including the amendment.

John Taylor testified that the Taylors all retained their rights as beneficiaries to pursue the Maile suit, and that testimony was not controverted by any party to the Disclaimer Agreement. Mr. Runft made a valiant effort to reinterpret the clear language of both the Disclaimer Agreement and the decision in *Taylor v. Maile II*, but his theory was so convoluted as to be inherently unbelievable ... it just didn't make any sense. The Mailes obviously could not have relied on Mr. Runft's interpretation when they filed the second action in December of 2007. He was first consulted on June 4, 2010. R. p. 2380.

4. Mailes' position is not supported by the letter to Bart Harwood

Mailes attempt to buttress their misinterpretation of the Disclaimer Agreement with an April 4, 2004 letter from Connie Taylor to Bart Harwood. In their Appendix A, they take two sentences from that letter out of context and misrepresent their meaning.

When the entire letter (R. p. 560 – 562) is read, it is clear that the comment about the Taylors "giving up their rights as beneficiaries" referred only to the proposal that they release the successor trustees from any potential claims and waive their right to an accounting of the trust. This is made crystal clear at the end of the letter, which discusses the records which the successor trustees had not provided and states the Taylors "will waive their right to these records only if Beth executes an affidavit and expedites the signing of the documents so they may proceed with the suit against Mr. Maile." R. p. 562.

The letter is also inadmissible under the parol evidence rule, which precludes extrinsic evidence of prior or contemporaneous negotiations or conversations to contradict, vary, alter, add to, or detract from the terms of an unambiguous contract." *Howard v. Perry,* 141 Idaho 139, 106 P.3d 465, 467 (2005). The presence of a merger clause in a written contract conclusively establishes that the agreement is integrated and therefore subject to the parol evidence rule. *Id.,* 141 Idaho at 142. The Disclaimer, Release & Indemnity Agreement contains an express provision that "all prior or contemporaneous agreements, understandings, representations, warranties and statements, oral or written, are superseded."[49]

5. The excerpts of testimony do not support the Mailes' theories

The Mailes also support their misinterpretation of the Disclaimer Agreement with excerpts of transcripts in which Helen Taylor's sons say the Trust is for their mother and they are pursuing the property for her benefit. It would have been improper if they had said anything else; the Johnson Trust provides that Helen Taylor's interest doesn't pass to her children until after her death. R. p. 432, L. 9-25. Mrs. Taylor is over 90 years old[50] and is still very much alive. Her sons' statements about the benefits of the trust going to her are absolutely accurate, and do not mean they had given up their beneficial interest.

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[49] R. p. 550, paragraph 10.

[50] Tr. Vol. I, p. 53, L. 7

It is ironic that Mr. Maile, in particular, finds these statements so nefarious as to support allegations of criminal conduct and fraud on the court. As the attorney who drafted the trust, he knows that Helen Taylor is entitled to the income from the trust for life, and that the corpus and any undistributed income will pass to her children only when she dies.

6. Mailes' legal malpractice claims were frivolous

Finally, there was absolutely no merit to Mailes' three counts of legal malpractice against their opponents' attorneys. Idaho law is clear that a person can only bring a legal malpractice claim against an attorney with whom they had an attorney-client relationship. That fundamental legal principle was recently reiterated in 2005 in a case these Appellants no doubt read - *Taylor v. Maile I,* 142 Idaho at 258-59.

7. There was substantial evidence to show the Mailes abused process by seeking conflicting rulings from different judges

In setting forth the evidence which supported the abuse of process claim, one of the things Judge Greenwood pointed to was the evidence that the Mailes were going "*back and forth playing one judge against another.*" The Idaho Rules of Civil Procedure establish the proper procedure in civil litigation, and Idaho R. Civ. P. 11(a)(2) provides that if a party has made application to a judge for issuance of an order which is denied, that party may not make any subsequent application to any other judge except by appeal to a higher court.

The jurors heard ample testimony about the fact that Mailes were, indeed, working both ends of the hallway, asking Judge Wilper to enforce the very judgment they were, at the same

time, asking Judge Greenwood to set aside.[51] The evidence established that Mailes violated Idaho R. Civ. P. 11(a)(2) repeatedly. They had appealed Judge Wilper's judgment that their purchase contract was void ab initio. Rather than allowing that appeal to address their issues, they filed the second lawsuit asking a different judge to return the Johnson farm to them. After the Supreme Court had rejected all their arguments in the first case, they went back to Judge Judge Wilper and asked him to enforce his judgment, all the while pursuing their claim to have it set aside in Judge Greenwood's court. After Judge Greenwood dismissed their action, the Mailes violated the rule again by going back to Judge Wilper and asking him to quiet title (in the guise of foreclosing on a lien), essentially asking him to reverse himself, the Supreme Court, and Judge Greenwood.

The Mailes were simply going from court to court to court, trying to find any judge willing to contradict all the others who had already ruled they have no right to the Johnson farm. They cannot legitimately argue this conduct was a proper use of the legal process, and as Judge Greenwood noted, the evidence of that conduct supported the jury's verdict.

b) There was substantial evidence the Mailes used the legal process for an improper purpose

Judge Greenwood succinctly summarized the evidence which supported a finding that the Mailes used the legal process for an improper purpose:[52]

[51] Tr. Vol. I, p. 73, L. 9 – p. 74, L. 20.

[52] Tr. April 14, 2011 hearing, p. 14, L. 12 – p. 15, L. 8.

> ... And as to improper purpose, the inference could be drawn, based upon the evidence and testimony, that the Mailes were interested in punishing the Taylors and the Johnson Trust for sake of punishment for having done them out of the land. I don't know that a jury did that; it's also equally possible that a jury could have found, I think properly, that there was an improper purpose in attempting to get ground back for which the Mailes had no legal claim. That part, that much is clear based upon Judge Wilper's ruling which became final after the appeal. And Mr. Maile testified directly on the stand he wanted the land back so he could build the barn with his son. And it is land to which he has no legal claim. And filing this lawsuit in an effort to somehow coerce or get back that land is totally improper. And both of the Mailes apparently are complicit in that from listening to Mrs. Maile's testimony. So I think there is ample evidence to support the jury's finding of abuse of process. ...

(1) **Coercion is improper.** The evidence at trial supported a finding that the Mailes used their second lawsuit as a club, in an attempt to coerce the Taylors into giving up the Johnson Trust's land. They were not legally required to do so because Judge Wilper had ruled the Mailes have no right to own the Johnson Trust property. This attempted coercion is recognized as an improper purpose:

> The improper purpose usually takes the form of coercion to obtain a collateral advantage, not properly involved in the proceeding itself, such as the surrender of property or the payment of money, but the use of the process as a threat or a club.

Prosser, *The Law of Torts* § 121, at 857 (footnote omitted).

Judge Greenwood correctly noted that the wrongful motive may be inferred from Mailes' continued attempts to get title to property to which they had no legal right. Mr. and Mrs. Maile have demonstrated that they are willing to use any means, including duplicative lawsuits, suits with no valid basis in fact or law, continued appeals of issues repeatedly argued unsuccessfully, and "disingenuous" attempts to get the land back by foreclosing on the vendee's lien while

simultaneously challenging the judgment upon which the lien is based.

(2) Using the legal process to harass and punish is improper.

Under Idaho Code § 12-123 and Idaho R. Civ. P. 11(a)(1), it is improper to engage in conduct in a civil action which serves merely to harass or maliciously injure another party to the action. There was ample evidence to demonstrate the Mailes were doing exactly that in their case.

The testimony of the Mailes provided substantial evidence of their improper objective or purpose to harm the Taylors. Both John Runft and Thomas Maile acknowledged that the Amended Petition filed in the probate court completely replaced the petition upon which all their claims were based, and they also acknowledged that the Supreme Court in *Taylor* II rejected every one of the Mailes' contentions. Nonetheless, in their trial testimony both Colleen and Thomas Maile ignored those facts, claiming the Taylors had stolen their land by lying to the court.

The jurors had the opportunity to review the allegations in Mailes' 62 page Amended Complaint,[53] and to observe the apparent relish with which Colleen and Thomas Maile repeatedly used the words "perjury," "liars," "racketeering," and "criminal conduct." That zeal has not diminished on appeal. It would have been entirely legitimate for the jurors to infer that the Mailes were not being truthful when they said they had no intention of harming the Taylors or their attorneys when they filed the second lawsuit.

[53] R. Exhibits, p. 185-247.

The jurors were instructed that "intent may be established by inference as well as by direct proof,"[54] and they had substantial evidence from which to infer that the Mailes had an improper objective to harm the Taylors and their counsel. The jurors could have legitimately concluded that Mr. Maile had little credibility on any issue, in light of Judge Wilper's ruling Mr. Maile had not told the truth when he testified under oath in the unjust enrichment trial that he had informed Ted Johnson of their conflict of interest and the need for independent counsel.[55] The jurors heard about the fact that in Taylor v. Maile, Mr. Maile's untruthfulness had been exposed and recognized by Judge Wilper (R. p. 218-224). It would have been entirely reasonable to infer that in filing the second lawsuit, the Mailes' true purpose was to seek retribution and punish and humiliate the Taylors and their attorneys by very publicly calling *them* liars, criminals, racketeers, thieves and frauds.

2. There was substantial evidence to support the Jury Verdict of Intentional Interference with Prospective Economic Advantage

Judge Greenwood was correct in ruling that there was substantial evidence to support the jury's verdict against Mailes on the intentional interference counterclaim.

The elements of the tort of intentional interference with a prospective economic advantage are: 1) The existence of a valid economic expectancy; 2) knowledge of the expectancy on the part of the interferer; (3) intentional interference inducing termination of the expectancy; (4) the interference was wrongful by some measure beyond the fact of the interference itself (i.e. that the defendant interfered for an improper purpose or improper means) and (5) resulting

[54] Jury Instruction 13, *Highland Enters., Inc. v. Barker*, 133 Idaho 330, 340, 986 P.2d 996, 1006 (2009)
[55] Tr. Vol. II, p. 90, L. 3-18.

damage to the plaintiff whose expectancy has been disrupted. *Idaho First Nat. Bank v. Bliss Valley Foods,* 121 Idaho 266, 284-85, 824 P.2d 841, 859-60 (1991).

The Mailes dispute only the fourth element, whether their interference was wrongful, again arguing that the filing of a mere complaint and lis pendens can't be seen to be wrongful.

The jurors were instructed[56] that a party may establish that intentional interference was wrongful by offering proof that **either** (1) the defendant had an improper objective or purpose to harm the plaintiff; **or** (2) the defendant used a wrongful means to cause injury to the prospective business relationship. Idaho has recognized that wrongfulness of intentional interference may also be shown by reason of a statute or other regulation, or a recognized rule of common law, or an established standard of trade or profession.[57] As discussed in section C.1(a) above, the filing of the second action, with no legitimate basis in fact or law, was a violation of Idaho R. Civ. P. 11(a)(1) and Idaho Code § 12-123. Seeking contradictory rulings on the same issue was a violation of Idaho R. Civ. P. 11(A)(2).

Judge Greenwood's finding that Mailes' second lawsuit was frivolous establishes the fact that the Mailes used a wrongful means to interfere with the Johnson Trust's right to sell the property. As Judge Greenwood noted, and as discussed in section C.1(b) above, there was also substantial evidence to support a legitimate inference that the Mailes had an improper objective or purpose to coerce the Taylors into giving up the Johnson farm, as well as to punish and

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[56] Jury Instruction No. 12

[57] *Idaho First Nat'l Bank v. Bliss Valley Foods, Inc.*, 121 Idaho 266, 285, 824 P.2d 841, 861 (1991).

humiliate the Taylors and their counsel.

In denying the motion for JNOV, the district court focused on the lis pendens and stated:

> To some extent the same considerations [as discussed on the abuse of process claim] apply as to the interference with the contract. The fundamental basis for that would be the second lis pendens arising from this lawsuit. ... this lawsuit itself may have been viewed as interference with a prospective economic advantage for tying up the ground, with or without the lis pendens. ... Nonetheless a jury could certainly have found, and I think it was improper to keep, the second lis pendens in place past the decision by the Supreme Court. That second lis pendens did tie up the property for some time. ... the jury certainly could have assessed some damages.[58]

Because the second lawsuit was frivolous and an improper use of the legal process, Judge Greenwood did not err in holding that the lis pendens filed in that suit was also improper, particularly after the *Taylor v. Maile II* decision was issued. Maintaining a lis pendens when there is no legitimate claim to ownership of the property will support claims for abuse of process and intentional interference. *Hewitt v. Rice*, 154 P.3d 408 (Colo. 2007), *Broadmoor Apartments of Charleston v. Horwitz*, 306 S.C. 482, 413 S.E.2d 9 (1991); *Cok v. Cok*, 558 A.2d 205 (R.I. 1989), *National City Bank v. Shortridge,* 689 N.E.2d 1248 (Ind. 1977).

The Mailes argue there was no testimony at trial that it was "wrongful" to maintain the Taylor v. Maile lis pendens for over six months after the Supreme Court ruled that the Mailes had no right to the Johnson Trust property. Mailes do not cite to any authority to indicate that maintaining a lis pendens long after a lawsuit has been decided could ever be proper. The purpose of a lis pendens is to provide constructive notice of the fact that an action affecting the title to real property is pending. Idaho Code § 5-505. This leads inescapably to the conclusion

[58] Tr. April 14, 2011 hearing, p. 16, L. 16-24.

that once the Supreme Court made a final decision and the lawsuit was over, the lis pendens in the first suit was no longer proper and failing to release it for six months was wrongful. This is a legitimate inference, which for purpose of the motion for judgment notwithstanding the verdict must be drawn in favor of the Johnson Trust.

When the evidence is considered as a whole, with all inferences being granted to the Johnson Trust, Judge Greenwood was correct in his ruling that there was substantial evidence the Mailes committed wrongful acts in interference with the Trust's economic expectancy.

D. Mailes are not entitled to immunity under the litigation privilege

During the seven and a half years of litigation over the Johnson Trust property, Mr. Maile has frequently represented himself, his wife, and their solely-owned LLC. He was doing so when he filed the Complaint and Amended Complaint in this matter.[59] Mr. Maile's license to practice law is currently suspended, but he continues to represent himself pro se in this appeal.

Mailes argue that the absolute litigation privilege discussed in the *Taylor v. McNichols*[60] decision is available not only to the attorneys of record but to the parties themselves. There is no merit to that contention. The absolute litigation privilege only protects parties from defamation claims based on statements made during the course of litigation. *Taylor v. McNichols*, 243 P.3d

[59] R. p. 44 and108.

[60] 149 Idaho 826, 243 P.3d 642 (2010).

at p. 652 - 653. A party may not be sued for libel or slander for statements made in the course of litigation, but may be held responsible for damages for abuse of process and interference with their opponent's legitimate economic expectations.

The *McNichols* decision does not support the Mailes' interpretation that the litigation privilege applies to parties in anything other than the well-recognized immunity from defamation actions. *Taylor v. McNichols* dealt solely with the question of whether a litigant may sue the attorney who represented his opponent. To accept Mailes' reading of *Taylor v. McNichols* as granting absolute immunity to all parties (as opposed to their independent counsel) would completely do away with the tort of abuse of process.

Thomas Maile's status as an attorney does not provide absolute immunity for his conduct in this litigation. In *Taylor v. McNichols,* the Court specifically ruled "the litigation privilege is an absolute privilege, which only applies when a specific condition precedent is met, namely, that an attorney is acting within the scope of his employment, and not solely for his personal interests." [61] The analysis is based on the presumption that an attorney who has been employed to represent a client is acting in the client's interest, not his own.

Mr. Maile has, at all times during this litigation, been acting solely for his own interests. There is no distinction between the interests of Thomas G. Maile, IV, the attorney, and Thomas and Colleen Maile and their LLC, as parties. If immunity were to apply in this situation, there would be no limit to the havoc an attorney could wreak when he has chosen to represent himself.

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[61] 149 Idaho 826, 837, 243 P.3d 642, 653 (2010).

The Mailes mistakenly read *Taylor v. McNichols* to require an allegation of fraud to avoid absolute immunity under the litigation privilege. In actuality, the opinion simply noted that each of the claims against McNichols, including fraud, had no basis and affirmed the trial court's dismissal of the claims under Idaho R. Civ. P. 12(b)(6).

E. The District Court Properly Awarded Costs to the Trust and Costs and Attorney Fees to Clark and Feeney Respondents

These Respondents concur in the Clark and Feeney respondents' briefing on this issue. Judge Greenwood did not abuse his discretion in determining that the Mailes' case was brought frivolously, as defined by Idaho Code § 12-123 and Idaho R. Civ. P. 54, and that the Johnson Trust was the prevailing party and thus entitled to an award of costs.

A prevailing party in an action is entitled to certain costs as a matter of right under Idaho R. Civ. P. 54(d)(1). A determination on prevailing parties is committed to the discretion of the trial court. *Eighteen Mile Ranch, LLC v. Nord Excavating & Paving, Inc.*, 141 Idaho 716, 718-19, 117 P.3d 130, 132-33 (2005). Idaho R. Civ. P. 54(d)(1)(B) guides courts' inquiries on the prevailing party question. That rule provides:

> In determining which party to an action is a prevailing party and entitled to costs, the trial court shall in its sound discretion consider the final judgment or result of the action in relation to the relief sought by the respective parties. The trial court in its sound discretion may determine that a party to an action prevailed in part and did not prevail in part, and upon so finding may apportion the costs between and among the parties in a fair and equitable manner after considering all of the issues and claims involved in the action and the resultant judgment or judgments obtained.

Idaho R. Civ. P. 54(d)(1)(B). Where there are claims and counterclaims between opposing parties, the court determines who prevailed "in the action;" that is, the prevailing party question is determined from an overall view, not a claim-by-claim analysis. *Shore v. Peterson,* 146 Idaho 903, 915, 204 P.3d 1114, 1126 (2009).

Identifying the prevailing party in this action required nothing more than noting the Mailes did not prevail on a single matter. All of their claims were dismissed on summary judgment, and a judgment was entered against them on each of the counterclaims. Judge Greenwood stated that he considered the factors set forth in Rule 54(e), and the Mailes have failed to establish that ruling was an abuse of discretion.

Judge Greenwood did not err in finding the Mailes' offer of judgment was not effective as a cost-shifting mechanism. The offer of judgment included the counterclaims and "any and all attorneys fees and costs which could be ordered relating to the complaint in the pending action pursued by Plaintiffs/Counter-Defendants." R. p. 2347. The verdict for the Johnson Trust of $28,437.36, when added to the $56,502.50 in fees awarded to the Clark and Feeney defendants, exceeded the $55,000 offer of judgment.

IV. COSTS AND ATTORNEY FEES ON APPEAL

A. Mailes are not entitled to fees on appeal

The Mailes request an award of fees on appeal based on Idaho App. R. 41, Idaho Code § 12-121, and Idaho Code § 18-7805, the racketeering statute. They are not entitled to fees under

any of those provisions for two very simple reasons: (1) Mailes were not the prevailing party below, and (2) the Respondents' defense in this appeal is not frivolous. Taylors and the Johnson Trust respectfully request that this Court deny their request for fees on appeal.

B. Taylors and the Johnson Trust are entitled to fees on appeal

The Johnson Trust and the Taylors request that this Court find this appeal was pursued frivolously and without foundation, and award costs and attorney fees on appeal pursuant to Idaho Code § 12-121 and Idaho App. R. 41. Because the Mailes have presented no persuasive argument in support of their contention that the district court abused its discretion in granting attorney fees below, an award of attorney fees on appeal is appropriate. *Durrant v. Christensen*, 117 Idaho 70, 785 P.2d 634 (1990).

This appeal is nothing more than an attempt to revisit issues which have been decided repeatedly in prior appeals to this Court. As Professor Lewis explained, the doctrine of finality goes to the heart of our legal system:

> I can't imagine a judicial system that tries cases, that have dispute resolution, that doesn't have a mechanism in place to tell people when the matter has been decided and when they got to get over it and when they got to get on with their life and tell them to leave the court system alone on that matter.[62]

If Mr. and Mrs. Maile are not required to pay for the consequences of their actions, there is no reason for them to ever stop filing new lawsuits and trying to relitigate the same issues over

[62] Tr. Vol. I, p. 150, L. 18 – p. 151, L. 2

and over again. They need this Court to tell them it is time to leave the court system alone and get on with their lives.

CONCLUSION

For the reasons stated above, this court should affirm the summary judgment for defendants, the jury verdict, the trial court's denial of the motion for judgment notwithstanding the verdict, and the award of costs and fees to defendants. The court should also award defendants their costs and attorney fees on appeal.

DATED this 15 day of September, 2011.

HENDERSON LAW FIRM, PLLC
ATTORNEYS FOR DALLAN TAYLOR, JOHN TAYLOR, AND JOHNSON TRUST

By _____
Connie W. Taylor

By _____
Paul L. Henderson

I HEREBY CERTIFY that on this____ day of September, 2011, I caused a true and correct copy of the foregoing **RESPONDENTS' BRIEF** to be served by the method indicated below, and addressed to the following:

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